



GRIC

Foundations for Prosecution Conference

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Virtual Via Zoom

REBUTTAL CLOSE

Presented by:

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Distributed by:

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REBUTTAL CLOSE

Amy Diederich, Deputy County
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WISE MEN
TALK
BECAUSE THEY
HAVE
SOMETHING
TO SAY;
FOOLS,
— **BECAUSE** —
THEY HAVE TO SAY
SOMETHING

-PLATO

Where do we go wrong?

- ▣ “Saving” our best stuff for rebuttal close because then the defendant can’t respond
- ▣ Speaking for too long
- ▣ Disorganization
- ▣ Trying to respond to everything in Defendant’s close piece by piece
- ▣ Lack of preparation / plan

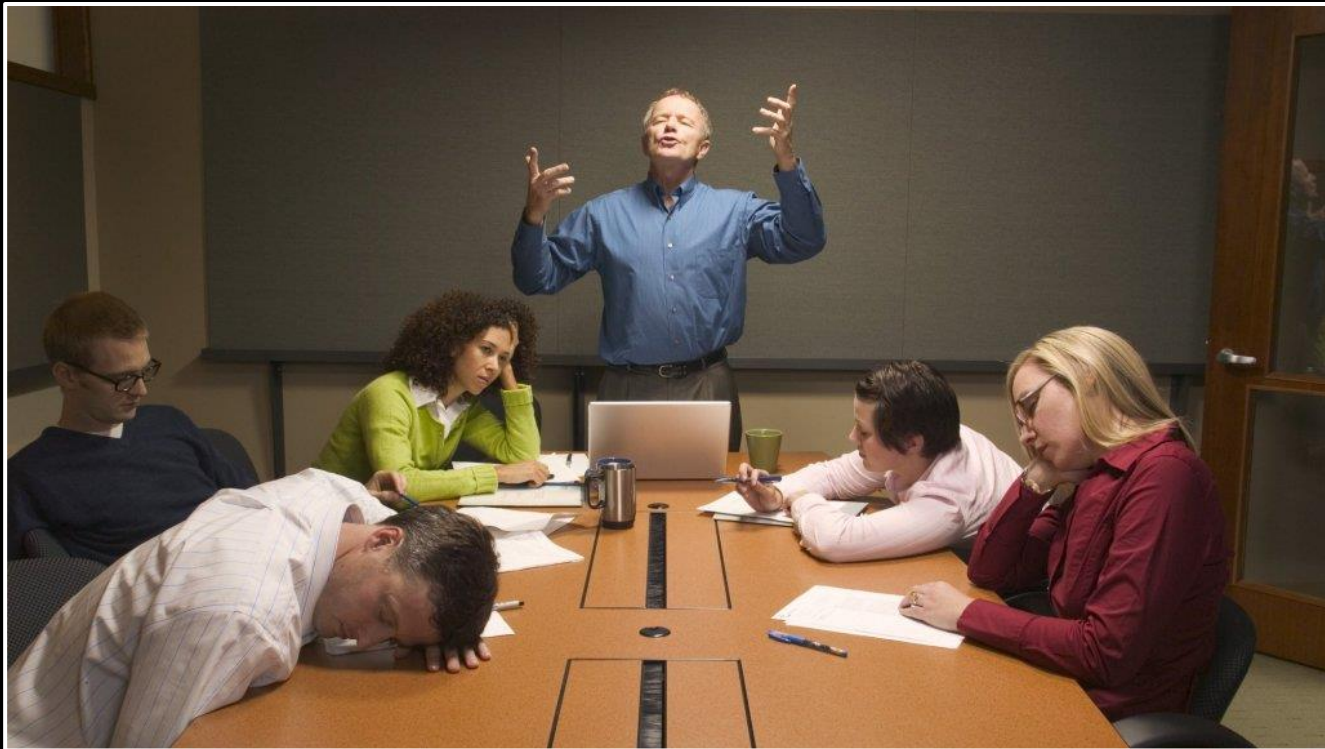
Saving the “good stuff”

- ▣ Why is this a BAD idea??
- ▣ Rebuttal is limited in scope
- ▣ Juror fatigue



Speaking for too long

- ▣ Good rule of thumb?
 - Not longer than 10 minutes (shorter if possible)



Getting Organized



Outline – Rebuttal Close

- ▣ Theme
 - Re-direct them to your position
 - ▣ “this case isn’t about ____ and ____, its about (state your theme)
- ▣ State and own our burden
- ▣ Explain why Defendant’s “doubt” isn’t reasonable
 - Crush them by using every piece of evidence that contradicts their theory/arguments and show why it is unreasonable to believe the Defense
 - Refer jurors back to instructions
- ▣ Theme and call to action

Rebuttal Close

- ▣ If the “theme” of First Close is “why you should be firmly convinced,” the “theme” of Rebuttal Close is “here’s why this doubt isn’t reasonable”

Return to your Theme

- ▣ First words out of your mouth
 - “This isn’t a case about____,
 - it’s a case about.....”

Own the Burden

- ▣ “Defense counsel told you that the State has the burden to prove each and every element of the offenses beyond a reasonable doubt. She is correct. I welcome that burden. And there is nothing I can do or say at any point that places that burden on the Defendant. However, in closing, the Defendant has made many arguments and insinuations which simply aren’t reasonable. They aren’t supported by any evidence in this case.”

Own the Burden

- ▣ Prefacing your arguments about the unreasonableness of the Defendant's case allows you to respond specifically without accusations of burden shifting or making improper arguments



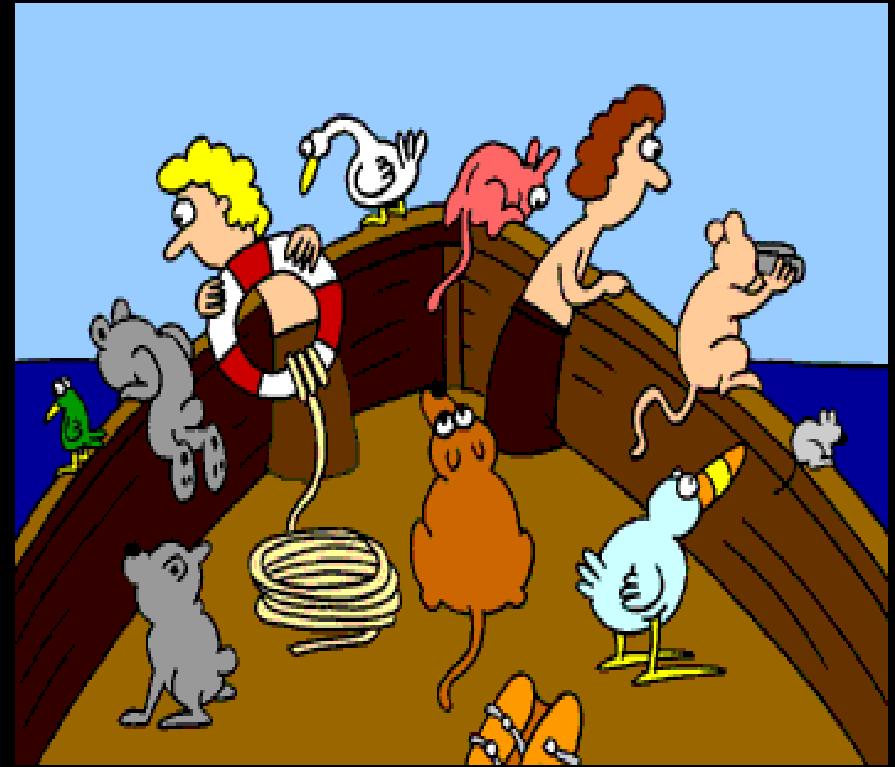
State may comment on Defendant's failure to produce evidence

- State v. Edmisten, 220 Ariz. 517
- State v. Herrera, 203 Ariz. 131
- State v. Fuller, 143 Ariz. 571

burden of proof. “It is well settled that a ‘prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify.’ ” *State v. Herrera*, 203 Ariz. 131, ¶ 19, 51 P.3d 353, 359 (App.2002), quoting *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). “Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it.” *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). Our supreme court has stated: “It strikes us as elemental fairness to allow the State to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence.” *Id*

Rebuttal Close

- ❑ Do NOT chase after every one of Defendant's arguments as if you are on a Snipe hunt!



03-02-1998

IT WASN'T UNTIL LATER THAT NOAH EXPLAINED THE "SNIPE OVERBOARD" GAG TO A NOT-VERY-HAPPY CREW

Rebuttal Close

- ▣ You must demonstrate that whatever “doubts” defense has raised are not reasonable
- ▣ Usually, defense has attempted to distract the jurors on a collateral matter



Rebuttal Close

- ▣ Group proposed defenses based on your organization, not theirs
 - ▣ Restate Defendant's position fairly
 - ▣ Mass all of the facts you have to show that Defendant's position isn't reasonable
- ▣ Example: "Defendant wants you to believe his BAC is inaccurate because of possible errors with the intoxilyzer"
 - ▣ "However, here is all the evidence you have before you that shows it was working properly on the night of his test"
 - Make a list:

Rebuttal Close

- ▣ Go back to case theory. FORCE them to choose
- ▣ “Defendant claims he didn’t know about the meth in his pocket and simply found it there. Here’s all the evidence which shows that isn’t true”

Refer to the Instructions

Furthermore, Defendant's argument is based purely on guesswork, which is exactly what you have been instructed NOT to do

▣ Standard Criminal 1: Duty of Jury

“Determine the facts only from the evidence produced in court. When I say "evidence", I mean the testimony of witnesses and the exhibits introduced in court. You should not guess about any fact.”

Have a plan

- ▣ You should have a good idea well before close what the Defendant is going to argue
 - How will you respond?
 - What evidence tends to show this isn't a reasonable position?
- ▣ Prepare for common defense arguments ahead of time

Rebuttal Close



Dealing with Defenses:

- ▣ Poor Investigation
 - Show the jury all the evidence they have as a result of the investigation
- ▣ Lack of Scientific Evidence
 - Defendant planned it this way
- ▣ Witness Credibility
 - Defendant chose victim he thought wouldn't be believed
- ▣ Conspiracy
 - If this was a conspiracy, it was a pretty terrible one
- ▣ Remind them of Voir Dire / Oath

Example:

- ▣ The Defendant is the reason we don't have direct evidence:

- Mask, Bandana, gloves ==> No DNA or Prints

Every single one of these steps was taken to make sure that no direct evidence was left, that no person could stand before him and point and say "this is the guy." Every single action was designed specifically for this day. And now he wants to stand before you and claim there's not enough evidence to convict him!

- Fled at over 100 MPH away from police
- Bailed from car before Deputy Schiess could see
- Fled on foot into the dark field

Closing Argument Don'ts

- ▣ Stating your opinion
 - “I believe the evidence has clearly shown the Defendant to be a liar”
- ▣ Vouching
 - “you must believe Officer Smith because he is a witness for the State, and we all know the prosecution are the good guys”
- ▣ Hyperbolic descriptions about Defendant or the case
 - “just look at those eyes. They are the eyes of a killer.”
- ▣ Personal attacks on Defense counsel
 - “he lied to you throughout this trial”
- ▣ Comments on Defendant's right not to testify or invocation of his rights
 - “if Defendant had nothing to hide, he would have just answered the officer's questions.”



*"I've hired this musician to play a sad melody while
I give you a sob story why I didn't do my homework.
It's actually quite effective."*

Questions???